

Date of Hearing: August 29, 2008

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
AB 437 (Jones) – As Amended: August 21, 2008

FOR CONCURRENCE

SUBJECT: STATUTES OF LIMITATION

KEY ISSUE: SHOULD EXISTING STATE LAW REGARDING THE COMMENCEMENT OF LIMITATIONS PERIODS BE PRESERVED BY REJECTING THE REASONING OF A CONTROVERSIAL U.S. SUPREME COURT DECISION WHICH, BY ONE VOTE, OVERTURNED MANY YEARS OF SETTLED LAW?

SYNOPSIS

This measure grows out of a controversial U.S. Supreme Court decision last year in Ledbetter v. Goodyear Tire & Rubber Co. When Lily Ledbetter retired after 19 years, she discovered through an anonymous note that her salary was thousands less than her lowest-paid male counterpart. She proved her case for sex discrimination in court. But, by one vote, the Supreme Court rejected long-established precedent and deprived her of that verdict, ruling that she and other victims should not be allowed to have their cases decided based on the facts because, the court held, an administrative complaint must be filed within 180 days after the discrimination began years earlier. The remainder of the court condemned the decision and called for a change in the law. According to the author and supporters, AB 437 seeks to ensure that victims of pay discrimination and similar wrongs continue to have a fair opportunity to present the facts of their case and seek redress in the courts for violations of state law by rejecting the Ledbetter ruling. The bill does not purport to assert when the statute of limitations should commence; it leaves that issue to existing statute and established case law. Rather, the bill simply declares that the Legislature rejects the Ledbetter interpretation as a matter of state law. It is supported by numerous women's groups and other civil rights and employment advocates who argue that the bill is needed to preserve fair access to and enforcement of protections against unlawful discrimination. Opponents, representing business and employer groups, contend on the other hand that the bill instructs courts to adopt a statute of limitations rule that is broad and limitless and would constitute a major expansion of employer liability. They would like to see Ledbetter adopted in California, arguing that it set forth a clear and common sense rule.

SUMMARY: Clarifies the meaning and effect of state laws regarding statutes of limitation.

The Senate amendments delete the Assembly version of this bill, and instead provide that the Legislature in order to construe and clarify the meaning and effect of existing law rejects the interpretation given to federal law by the United States (U.S.) Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (May 29, 2007).

EXISTING LAW contains provisions that define unlawful discrimination and other employment practices and establish procedures for an employee who has suffered discrimination or other unlawful practices, as defined, to file a complaint with the Fair Employment and Housing Department and/or the State Labor Commissioner, and under certain circumstances, to bring a

civil action against within specified time periods. (E.g., Government Code Section 12926 *et seq.*; Labor Code Section 98, *et seq.*)

AS PASSED BY THE ASSEMBLY, this bill dealt with local health officials.

FISCAL EFFECT: None

COMMENTS: When an act of discrimination – such as the issuance of a smaller pay check to a woman because of her gender – is part of a repeated pattern, when does the legal time period for filing a complaint begin to run: from the date of the first act, however clandestine, or each time the discrimination is repeated, for example with each new discriminatory paycheck? The author states that this bill would clarify and preserve existing law regarding when an unlawful act occurs for the purpose of triggering the limitations period. Specifically, this bill would establish that the Legislature rejects the interpretation given to federal law by the U.S. Supreme Court in *Ledbetter*. In that decision, a one-vote majority voted to overturn decades of precedent and substantially limited workers' ability to bring pay discrimination claims. In her dissent, Justice Ruth Bader Ginsberg called on Congress to act to correct the Court's misinterpretation of federal law. On June 22, 2007, H.R. 2831 (Miller) was introduced in Congress in response to the *Ledbetter* decision, but that measure has languished because of the prospects for veto by President Bush. While state legislation obviously cannot affect federal law, AB 437 states that the rationale of the *Ledbetter* decision is rejected for the purposes of state law, leaving it to develop as it has without adoption of the *Ledbetter* decision. (See, e.g., *Richards v. CH2M Hill*, 26 Cal. 4th 798 (2001)(recognizing longstanding continuing violation doctrine); *Yanowitz v. L'Oreal*, 36 Cal. 4th 1028, 1057, 1058 n.18.)

Supporters point to the difficulties employees experience in gathering evidence to substantiate their claims, and their fear of reprisal should they act too quickly by filing a complaint before they have sufficient evidence. They echo Justice Ginsberg's call for legislative action to correct the Court's re-interpretation of the law, and for Congress and this Legislature to act quickly. While originating in the context of a wage discrimination case, the author and supporters note, the *Ledbetter* precedent has already begun a troubling migration to other types of discrimination.

Among other publications, the Los Angeles Times recently opined:

The 5-4 decision in *Ledbetter vs. Goodyear Tire and Rubber Co.* undermined Title VII of the Civil Rights Act of 1964 by impossibly restricting the period during which a victim of unlawful discrimination can try to get full compensation. The employee has to know she's being discriminated against (most victims are women) and must file within 180 days of the gender-based decision to pay her less than men in the same job. If she discovers the unequal treatment only after it has been perpetrated for years, it's too late. A career's worth of inequity turns into less than half a year's worth of compensation.

[AB 437] already has been pared down to remove language that would have clarified how and when to file an action under California law to recover damages for gender pay discrimination; as presently worded, it would simply make clear that the *Ledbetter* reasoning is the wrong model for interpreting state labor law.

Some business interests are hoping that state courts will back away from decades of California's employment rights leadership and instead duplicate the unearned boon that

the *Ledbetter* case gave them. That's a mistake. In the long run, willful discrimination does not create a terrific business climate.

A coalition of business interests, lead by the California Chamber of Commerce, opposes the bill. Prior to recent amendments, they argued that the bill established new rules for statutes of limitations such that "each paycheck resulting from that [denial of a pay increase at annual performance evaluation] decision would be considered a new discriminatory act for purposes of determining the statute of limitations." That provision has been eliminated in the current version of the bill, leaving only a short and plain statement rejecting the *Ledbetter* interpretation for the purposes of state law. Business opponents now argue that the amended bill "effectively instructs courts to adopt a statute of limitations rule that is broad and limitless." Opponents do not say what that instruction to the courts is, but they contend it would constitute a "major expansion of employer liability." They would like to see *Ledbetter* adopted in California, arguing that it "set forth a clear and common sense rule."

ARGUMENTS IN SUPPORT: California National Organization for Women (NOW) states that it "strongly supports AB 437 (Jones) in order to ensure that victims of pay discrimination in California have ample opportunity to seek appropriate redress for discrimination. AB 437 is one of our top legislative priorities for 2008. Last year, the U.S. Supreme Court ruled in *Ledbetter vs. Goodyear Tire & Rubber Co.* that under federal law, if an employee doesn't file a claim within 180 days of her employer's decision to pay her less, she is barred forever from challenging the discriminatory paychecks that follow. This dramatically weakens the protections that federal laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967 and the Americans with Disabilities Act of 1990 have provided to employees for decades. AB 437 ensures that this interpretation of federal law is not applied to California laws such as the Fair Employment and Housing Act (FEHA). Often individuals in a workplace have no information regarding others' salaries. Thus, it may be years before one discovers that (s)he is the victim of unlawful discrimination. Such discrimination is not only wrong, but it impacts all of society. Every time a woman takes home a discriminatory paycheck it affects her whole family. No one should be forced to work for discriminatory pay without recourse."

Among other supporters, the California Coalition for Civil Rights states, "The California civil rights community is deeply concerned about the potential for wage discrimination under the *Ledbetter* ruling. The Supreme Court's decision ignores workplace realities. Salary information is often confidential, and most employees who are the victims of wage discrimination do not learn they are being discriminated against until years into their employment. The *Ledbetter* decision could force employees to file needless complaints simply to protect their rights before they have enough information to know whether they have been discriminated against or not. Wage discrimination causes real, enduring harm; the remedy needs to endure as well. AB 437 safeguards access to justice by assuring that the Court's faulty reading of discrimination law does not apply in California and reaffirming our state's commitment to non-discrimination in compensation."

ARGUMENTS IN OPPOSITION: A coalition of employer advocates argues as follows:

AB 437... could result in significant new employer liability and damages exposure in virtually any lawsuit challenging workplace decisions. AB 437, as recently amended, would codify in the California Code of Civil Procedure a sweeping statement of intent that the recent ruling by the U.S. Supreme Court in *Ledbetter v. Goodyear Tire & Rubber*

Co. (2007) 127 S. Ct. 2162 should be rejected for purposes of any statutes of limitation under existing California law, including but not limited to any Labor Code provision and the Fair Employment and Housing Act (FEHA). By doing so, AB 437 effectively instructs courts to adopt a statute of limitations rule that is broad and limitless, allowing for decades-old lawsuits and indefinite damages amounts. Moreover, because AB 437 broadly applies to any statute of limitations in existing law without specification, it could potentially be used to argue for unlimited lawsuit filing times and damages accrual under not only the Labor Code and the Fair Employment and Housing Act (FEHA) but any California statute.

The *Ledbetter* case set forth a clear and common sense rule that statutes of limitation, for purposes of workplace decisions, begin to run at the time of the employer's decision and rejected the notion that they are renewed each time the employee's pay, compensation, or benefits are subsequently affected by that decision. This is consistent with current California statutory and case law, in which there is no blanket rule that the repeated issuance of affected paychecks keeps lawsuits alive or that compensation or benefits merely being "affected" keeps a statute of limitations running.

Therefore, we believe AB 437 does far more than "construe and clarify" existing law. By instructing courts to reject the clear statutes of limitation rule in *Ledbetter*, which is arguably consistent with current California law, AB 437 in effect instructs and encourages California Courts to adopt the vague and indefinite statute of limitations rule that the *Ledbetter* court rejected. Adoption of a statute of limitations rule tied to the mere issuance of paycheck or benefits would allow for virtually unlimited time – 6, 10, even 20 years – to bring suit and for damages to build up against employers

A vague and indefinite statute of limitations scheme is unworkable and undermines important public policies behind statutes of limitation. This includes prompt surfacing and resolution of potential claims through dialogue between employers and employees. Clear time limits also balance competing interests by providing plaintiffs a sufficient time to file charges while preventing courts and employers from facing stale claims in which evidence is lost, memories have faded, or witnesses are no longer available.

Finally, we oppose AB 437's retroactive application to pending cases. There is nothing limiting it to prospective claims. AB 437 would also appear to breathe life into stale claims not yet filed. AB 437 also invites abuse of California's employment laws and frivolous claims when unwarranted litigation is already an issue under so many California laws.

REGISTERED SUPPORT / OPPOSITION:

Support

American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Federation of Television and Radio Artists (AFTRA)
Anti-Defamation League (ADL)
California Coalition for Civil Rights
California Commission on the Status of Women

California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Employment Lawyers Association
California Federation of Business and Professional Women (BPW)
California Labor Federation / AFL-CIO
California National Organization for Women (NOW)
California Nurses Association (CNA)
California Teachers Association
California Teamsters Public Affairs Council
California Women's Agenda
California Women Lawyers
California Women's Law Center
Consumer Attorneys of California
Equal Rights Advocates
Equality California
Engineers and Scientists of California
The Feminist Majority
Gray Panthers
Hadassah Southern California
Lambda Letters Project
Older Women's League
Mom's Rising
National Association of Social Workers (NASW)
People for the American Way
Professional & Technical Engineers, Local 21
Public Advocates, Inc.
Sacramento Regional Human Rights/Fair Housing Commission
City and County of San Francisco - Department on the Status of Women
SEIU – California State Council
SEIU, Local 1000
Strategic Committee of Public Employees, Laborers' International Union of N. America
Stonewall Democratic Club of Greater Sacramento
United Food and Commercial Workers Union, Western State Council
UNITE HERE!
9 to 5 – National Association of Working Women

Opposition

California Chamber of Commerce
Associated Builders and Contractors of California
Associated General Contractors of California
Association of California Insurance Companies
California Apartment Association
California Association of Health Facilities
California Bankers Association
California Building Industry Association
California Business Properties Association
California Citizens Against Lawsuit Abuse
California Employment Law Council

California Farm Bureau Federation
California Financial Services Association
California Grocers Association
California Hospital Association
California Hotel and Lodging Association
California Independent Grocers Association
California Lodging Industry Association
California Manufacturers and Technology Association
California New Car Dealers Association
California Restaurant Association
California Retailers Association
California State Association of Counties
California Taxpayers Association
Civil Justice Association of California
CSAC Excess Insurance Authority
Greater Bakersfield Chamber of Commerce
League of California Cities
Lumber Association of California & Nevada
Motion Picture Association of America, Inc.
National Federation of Independent Business
Oxnard Chamber of Commerce
Outsource Telecom
Pacific Auxiliary Fire Alarm Co.
Regional Legislative Alliance
Simi Valley Chamber of Commerce
United Chambers of Commerce of the San Fernando Valley
Western Electrical Contractors Association, Inc.
Wine Institute

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334